IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re CRYSTAL ELAINE RATLIFF a/k/a CRYSTAL ELAINE KELLY and BERT RATLIFF, Debtors.	No. 97-20652 Chapter 7
JAMES L. SPRINGER, JR., and JANE L. SPRINGER, Plaintiffs, *vs*. CRYSTAL ELAINE RATLIFF and BERT RATLIFF, Defendants.	Adv. Pro. No. 97-2048

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding seeks a nondischargeability determination pursuant to 11 U.S.C. § 523(a)(2)(A) and (4) of a Kentucky state court judgment entered against the debtors in favor of plaintiffs James and Jane Springer. Pending before the court is the debtors' motion for judgment on the pleadings and for summary judgment filed on October 8, 1997. Because the complaint fails to set forth allegations establishing a *prima facie* cause of action under either subsection (a)(2)(A) or (4) of 11 U.S.C. § 523, the motion for judgment on the pleadings will be granted and the complaint dismissed. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(I).

I.

On March 14, 1997, the debtors filed a petition under chapter 7 of the Bankruptcy Code. The complaint initiating this action was filed by the plaintiffs[1] on July 7, 1997. Plaintiffs

[1]It is unclear from the complaint as to whether both James and Jane Springer were intended to be named as plaintiffs since none of the names of the parties to the adversary proceeding were included in the caption for the complaint as required by Fed. R. Bankr. P. 7010 and Official Form 16C and the text of the complaint is ambiguous in this regard. The introductory paragraph of the complaint and in sections II. and III. respectively entitled "Parties" and "Requested Relief," James Springer is identified as the sole plaintiff asserting the action. However, both James and Jane Springer are referred to as plaintiffs in sections III., IV. and V. of the complaint.
(continued...)

allege that they entered into a contract with the debtors for construction of a home on July 12, 1994, advancing $55,000.00 up front, and that the debtors failed to honor the contract in that the only work done toward the performance of the contract was the clearing of the lot. Plaintiffs further allege that they filed suit against the debtors in state court and that after a jury trial on April 24, 1995, a judgment was entered against the debtors in the amount of $40,000.00, of which $18,000.00 has been collected, leaving an outstanding balance of $22,000.00 in principal and approximately $8,000.00 in interest. After these factual statements, the complaint sets forth two counts, each consisting of three paragraphs which recite as follows:

> IV. Count I: Violation of 11 USC § 523(a)(2)(A)
>
> 12. Plaintiffs, James L. Springer, Jr. and Jane L. Springer, reassert Paragraphs 1 though 11 by reference as if specifically set forth herein.
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> 13. The Debtors, through false pretenses, false representations, and/or actual fraud acted to induce Plaintiffs to enter into a contract for valuable consideration, and in the absence of the said false pretenses, false representations, and/or actual fraud by the Debtors, Plaintiffs would not have entered into the Contract and incurred the losses attributable to the Debtors.
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> 14. The Debtors' conduct violates 11 USC § 523(a)(2), and therefore, the Debtors' indebtedness to

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[1](...continued)
Accordingly, the court presumes that both James and Jane Springer are named as plaintiffs.

Plaintiffs constitutes a nondischargeable debt.

V. Count II: Violation of 1 [sic] USC § 523(a)(4)

15. Plaintiff, James L. Springer, Jr. and Jane L. Springer, reassert Paragraphs 1 through 14 by reference as if specifically set forth herein.

16. The debtors engaged in fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, and in the absence of said fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, Plaintiffs would not have incurred the losses attributable to the Debtors.

17. Such conduct violates 11 USC § 523(a)(4) and, therefore, the Debtors' indebtedness to Plaintiffs constitutes a nondischargeable debt.

In their answer filed August 5, 1997, the debtors admit the existence of the contract, the advanced monies, and the state court judgment but deny any allegation of fraud, defalcation or wrongdoing. They explain that upon commencing the contract, they encountered unanticipated site conditions necessitating higher costs which the debtors intended to spread over the life of the entire $250,000.00 project. Despite these unexpected costs, the debtors assert that they were willing and able to continue performance under the contract but were directed by the plaintiffs to discontinue performance when plaintiff James Springer lost his position with Pikeville National Bank. The debtors note that the state court awarded them a set-off of $15,000.00 for the work they performed against the $55,000.00 advance.

On August 12, 1997, a pretrial conference was held and thereafter an order was entered on September 2, 1997, setting a discovery cutoff of October 20, 1997, dispositive motion deadline of November 1, 1997, and trial for December 9, 1997. That order specifically provides that responses to dispositive motions such as the one presently pending "must be filed within ten days after the filing of such motion" and that the "[f]ailure to respond within the time allowed may be deemed an admission that the motion is well taken and should be granted." The plaintiffs have not filed a response to the debtors' motion.

II.

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), as incorporated by Fed. R. Bankr. P. 7012(b) provides that:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material facts made pertinent to such a motion by Rule 56.

In considering such a motion, all well-pleaded material allegations contained in the complaint must be accepted as true. *See U.S. v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993); *Lavado v.*

Keohane, 992 F.2d 601, 605 (6th Cir. 1993). The motion will be granted when no material issue of fact exists and the movant is entitled to a judgment as a matter of law. *See, e.g., Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991).

Plaintiffs assert that the state court judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (4). These subsections provide in pertinent part that:

> A discharge under section 727 ... does not discharge an individual debtor from any debt—
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> (A) false pretenses, a false representation, or actual fraud ...;
> ...
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

The court will review the allegations contained in the complaint to determine if a *prima facie* cause of action under either subsection has been asserted.

III.

The two counts contained in the plaintiffs' complaint which are quoted verbatim above contain no specific allegations. Rather the counts simply assert legal conclusions which parrot the pertinent subsections of § 523. Paragraph 13 of the

complaint states that the debtors "through false pretenses, false representations, and/or actual fraud acted to induce Plaintiffs to enter into a contract for valuable consideration, and in the absence of the said false pretenses, false representations, and/or actual fraud by the Debtors, Plaintiffs would not have entered into the Contract and incurred the losses attributable to the Debtors." However, at no place in the complaint do the plaintiffs allege any false pretenses, false representations, or actual fraud by the debtors.[2] Instead, the only specific allegation of wrongdoing is that the debtors "failed to honor this contract." Mere breach of contract or failure to perform, without more, does not constitute fraud. See *Ellis v. Shear (In re Shear)*, 123 B.R. 247, 253 (Bankr. N.D. Ohio 1991); *Krenowsky v. Haining (Matter of Haining)*, 119 B.R. 460, 463 (Bankr. D. Del. 1990).

Likewise in paragraph 16 of the complaint the plaintiffs allege that the debtors "engaged in fraud or defalcation while

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[2]To establish fraud under section 523(a)(2)(A), five elements must be proven:(1) that the debtor made representations; (2) that at the time the representations were made the debtor knew them to be false; (3) that the debtor made the representations with the intention and purpose of deceiving the creditor; (4) that the creditor relied on the representations; and (5) that the creditor sustained the alleged injury as a proximate result of the representations. *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993).

acting in a fiduciary capacity, embezzlement, or larceny, and in the absence of said fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, Plaintiffs would not have incurred the losses attributable to the Debtors." But nowhere in the complaint do plaintiffs allege any facts constituting fraud or defalcation while acting in a fiduciary capacity,[3] embezzlement or larceny.[4]

In moving for judgment on the pleadings, the debtors note that Fed. R. Civ. P. 9(b), as incorporated by Fed. R. Bankr. P. 7009, requires that "[i]n all averments of fraud ... the circumstances constituting the fraud ... shall be stated with particularity." Not only do the plaintiffs fail to state with

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[3]"[T]he defalcation provision of § 523(a)(4) is limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor. [Citation omitted.] Defalcation then occurs through the misappropriation or failure to properly account for those trust funds." *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997). The existence of an express or technical trust is not alleged in the complaint. Furthermore, from the facts that are alleged, it appears that the relationship between the plaintiffs and the debtors was simply a contractual one, rather than fiducial.

[4]Embezzlement is the fraudulent appropriation of property by a person to whom such property had been lawfully entrusted or into whose hands it has lawfully come. Larceny is the wrongful taking and carrying away of property of another with intent to convert said property to one's use without the consent of the owner. *See, e.g., Werner v. Hofmann (In re Hofmann)*, 144 B.R. 459, 464 (Bankr. D.N.D. 1992), *aff'd*, 161 B.R. 998 (D.N.D. 1992), *aff'd*, 5 F.3d 1170 (8th Cir. 1993).

particularity the circumstances constituting the fraud, the complaint contains no allegations whatsoever which would conceivably constitute fraud. Because the pleadings are closed and plaintiffs have failed to come forward with any allegations which constitute a cause of action under either § 523(a)(2)(A) or (4), the court must grant judgment on the pleadings in favor of the debtors.

IV.

The debtors alternatively move for summary judgment under Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, contending that the doctrines of *res judicata* and collateral estoppel[5] are applicable to bar the plaintiffs' complaint. In support, the debtors attach a certified copy of the state court complaint filed by plaintiffs and assert that the judgment

[5]*Res judicata* or claim preclusion bars further litigation between the same parties or their privies of any claims based on the same cause of action which could have been raised in the initial proceeding, regardless of whether they actually were raised. The narrower principle of collateral estoppel or issue preclusion precludes relitigation of only those issues which were actually raised and determined in the earlier proceeding. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 894 n.1 (1984); *Brown v. Felsen*, 442 U.S. 127, 138 n.10, 99 S. Ct. 2205, 2212 n.10 (1979). *See also Heyliger v. State Univ. and Community College Sys. of Tennessee*, ___ F.3d ___, 1997 WL 606414 (6th Cir. Oct. 3, 1997).

obtained by the plaintiffs was for breach of contract rather than fraud. As the court has determined that the debtors are entitled to a judgment on the pleadings, it need not decide the motion for summary judgment. The court notes, however, that the United States Supreme Court has held that *res judicata* does not apply in determining the dischargeability of fraud debts previously reduced to judgment. *See Brown v. Felsen*, 442 U.S. 127, 138-39, 99 S. Ct. 2205, 2213 (1979). To hold otherwise, stated the court, would frustrate the Congressional directive that bankruptcy courts have exclusive jurisdiction over the fraud exceptions to discharge set forth in 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), (a)(4) and (a)(6). *Id*. at 135-136, 99 S. Ct. at 2211-12. As for the doctrine of collateral estoppel, the debtors argue that the issue of fraud was not pled or litigated in the state court complaint. That issue having not been "actually litigated," the plaintiffs cannot establish all the requisite elements of collateral estoppel.

In conclusion, the court will enter an order granting debtors judgment on the pleadings since the plaintiffs have failed to plead any allegations which constitute a cause of action under either 11 U.S.C. § 523(a)(2)(A) or (4) or otherwise respond to the motion asserting the existence of any material fact which would preclude the granting of the motion.

FILED: October 31, 1997

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE